**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CIVIL REVISION APPLICATION No. 599 of 1996**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE RAVI R.TRIPATHI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**BELEVIEW ASSOCIATIONS**
**Versus**
**AMBALAL HIRABHAI PRAJAPATI AND OTHERS**

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**Appearance :**
MR MA PAREKH for the Petitioner
MR MAHESH BHAVSAR for Respondent No.1

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**CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI**

**Date : 07/12/2005**

**ORAL JUDGMENT**

1. The petitioner – Beleview Associations, described as registered non-trading corporation is before this Court challenging the order passed by the Deputy Collector, Viramgam Prant dated 23rd February 1996 in Mamlatdars' Courts Act/Revision/Case No.2/94-95. The Deputy Collector was pleased to dismiss the appeal filed by the present

petitioner against the order passed by the Mamlatdar, Daskroi dated 09.01.1995 in Mamlatdars' Courts Case No.2/94.

2. Mr.M.A.Parekh, the learned advocate for the petitioner vehemently contended that the Mamlatdar, Daskroi has committed a grave error in passing an order directing the petitioner to open the 'way' leading to land bearing block No.371 through the land bearing block No.372 of village 'Lapkaman', Taluka 'Daskroi'. He submitted that under Sub-section 2 of Section 5 of Mamlatdars' Courts Act, 1906, the Mamlatdar has no power to pass such order. He submitted that this Court in the matter of **PATHAN MUKHTYARKHAN AJAMKHAN VS. PATHAN USMANKHAN REHMATKHAN**, reported in (1973) 14 GLR 607 has observed in paragraph No.3 that:

> “3. The powers of the Mamlatdar functioning under the Mamlatdars' Courts Act, 1906, hereinafter referred to as “the Act”, are to be found in sec. 5. Under sub-sec. 5(1) of the Act, the Mamlatdar has the power under clause (a) to deal with impediments, erected otherwise than under due authority of law, to the natural flow in a defined channel or otherwise of any surface water. Under clause (b), he has to jurisdiction to give immediate possession of any lands or premises used for agriculture or grazing to any person who has been dispossessed or

deprived thereof otherwise than by due course of law. It was not the case of the plaintiff that there was any impediment to natural flow of any surface water, nor was it his contention that he was deprived of possession of any agricultural land and, therefore, the case of the plaintiff would not fall under either of the two clauses of sub-sec. (1) of sec. 5 of the Act. Sub-sec. (2) of sec. 5 confers power on the Mamlatdar to issue injunction. Under sub-sec. (1), the Mamlatdar can remove the impediment or cause the same to be removed and in the case of dispossession, can give immediate possession; whereas, under sub-sec. (2), the Mamlatdar can only issue an injunction requiring the person concerned to refrain from doing one or the other thing mentioned in the section. In light of the facts of this particular case, the relevant provisions of sub-sec. (2) read as follows :

> “The said Court shall also, subject to the same provisions, have power within the said limits..... when any person is otherwise than by due course of law disturbed or obstructed..... in the use of roads or customary ways thereto, to issue an injunction, requiring him to refrain from..... causing or attempting to cause any further such disturbance or obstruction.”

This is the extent of the jurisdiction of the Mamlatdar under sub-sec. (2) of sec. 5 of the Act. It is, therefore, obvious that the Mamlatdar has no jurisdiction to issue any order directing removal of

the obstruction or to cause the obstruction to be removed. Under these circumstances, the Mamlatdar, when he directed that the defendant should remove the alleged obstruction created by him in the alleged public 'Nelia", was not acting within the four corners of the jurisdiction conferred upon him under sub-sec. (2) of sec. 5 of the Act. In the course of the arguments before me, the provisions of sec. 19, clause (c) were referred to; but that section deals with points to be decided by the Mamlatdar at the hearing and sec. 19 does not deal with the power of the Mamlatdar to pass the appropriate order. Mr.Zaveri for the respondent, original plaintiff, drew my attention to the provisions of sec. 21(2) and also to the Form in Schedule "C" which lays down the form of injunction to be issued under sec. 21, sub-sec. (2). Sec. 21, sub-sec. (2) mentions :

> "Where the Mamlatdar's decision is for granting an injunction, he shall cause the same to be prepared in the form of Schedule BB or C, as the case may be, and shall deliver or tender the same then and there to the defendant, if present, or if the defendant is not present, shall send it to the village-officers, or to any subordinate under his control, to be served upon the defendant."

In the instant case, the Mamlatdar directed that an order under sec.21, sub-sec. (2) in form C should be issued and the second paragraph of the form of injunction in Schedule "C" mentions : "You are hereby prohibited from making any further attempt to

> disturb or obstruct..... the said plaintiff in his possession of the said property..... otherwise than in execution of the decree of a competent Civil Court." It also refers to the obstruction of the enjoyment of the right of way when Form 'C' is read as a whole. It is, therefore, clear that the order which has been actually issued by the Mamlatdar in the instant case is not actually in the form in Schedule 'C' inasmuch as it directs the petitioner, in terms to remove the obstruction put up by him. The power of directing removal of any obstruction or impediment is only conferred upon the Mamlatdar in cases arising under sec. 5(1)(a), but the case of the plaintiff clearly does not fall under sec. 5(1)(a) since there is no question of any impediment created in the flow of any surface water. The only conclusion that can be drawn on the facts of this case is that the Mamlatdar has exceeded his jurisdiction under sec. 5(2) in passing the order that he has done and the Prant Officer who dismissed the revision application of the present petitioner failed to exercise his jurisdiction in revision when he came to the conclusion that the Mamlatdar had followed the procedure prescribed by law."

The learned advocate relying on these observations submitted that the order of the Mamlatdar as well as that of the Deputy Collector be quashed and set aside. He submitted that this being a pure question of law, this revision application be allowed. Before dealing with the legal submission of the learned advocate, few facts are

necessary to be taken note of.

3. One Ambalal Hiralal Prajapati filed an application (which was registered as Mamlatdars' Courts Case No.2/94 under Section 5 of the Mamlatdars' Courts Act, 1906) praying that the 'way' leading to his agricultural land bearing block No.371 be ordered to be opened, which according to him, was closed by encroaching upon by the present petitioner (opponent in Mamlatdars' Courts Case No.2/94).

The application was filed on 08.09.1993. It was registered as Mamlatdars' Courts Case No.2/94. It was decided on 09.01.1995. During the entire proceedings, the petitioner herein did not remain present before the Mamlatdar. The Mamlatdar, on receipt of the application, got the matter investigated by Talati-cum-Mantri. The report prepared by Talati-cum-Mantri was verified by Circle Inspector. On the receipt of the report, the case was registered (Mamlatdars' Courts Case No.2/94).

The notices were issued to the parties. The applicant – respondent No.1 herein remained present and submitted his case that there was a 'way' on the 'southern end' of block No.372 using which he was going

to his land bearing block No.371, but for last 3 years, owners of block No.372 have obstructed that way by making a wire fencing, as they have got the land converted in NA and have sold the same after plotting to different parties. The applicant submitted that he is not able to cultivate his land for last two years. He, therefore, prayed that an order to open the 'way' be made. The applicant examined one Mr.Chaheraji Laxmanji Thakor, a farmer from the same village 'Lapkaman' alongwith one Mr.Baldevbhai Aatmaram Patel.

The Mamlatdar has recorded that despite issuance and service of notice to the present petitioner (respondent in Mamlatdars' Courts Case No.2/94) of various dates of hearing, he has not remained present. The Mamlatdar has recorded that on the following dates, i.e. 29.06.1994, 12.05.1994, 24.06.1994, 22.07.1994, 22.08.1994 and 30.11.1994, the hearing was fixed. It is on record that on 01.05.1994 and 22.05.1994, the intimation was sent by Registered Post A.D., of which A.D. slip is on record, but the petitioner did not remain present on any of the dates of hearing. Finally, the hearing was kept on 09.01.1995 and the case was decided on merits. The Mamlatdar has recorded that the land bearing block No.371 is in the names of Ranchodbhai

Hirabhai, Ambalal Hirabhai etc. In the land records, the land bearing block No.372 is in the name of Beleview Association and it is non-agricultural. Though it is averred by the applicant that block No.372 is divided in various plots and sold to different persons, but no names are entered in the record. But then, factually, at the site, owners of sub-plot Nos.45 and 46 have closed the way to go the block No.371 by making wire fencing. The adjoining land holders, viz. Chaheraji Laxmanji Thakor and Baldevbhai Aatmaram Patel have supported the case of the applicant and in their deposition, they have prayed that the 'way' be made open. They have stated in their deposition that from time immemorial (Para Purva Thi), there was a way and it was used not only by pedestrians, but also for taking bullocks, bullock carts, other vehicles. It was on the southern end of block No.372 and it is closed. Therefore, for last two years, the owner of block No.371 is not able to cultivate his land.

The Mamlatdar after taking into consideration the aforesaid facts, decided the matter on 09.01.1995 and passed an order that the 'way' leading to block No.371 from block No.372 be opened.

4. The petitioner being aggrieved of that approached

the Deputy Collector, Viramgam Prant by filing Mamlatdars' Courts Act/Revision/Case No.2/94-95. The application filed before the Deputy Collector was time barred, hence before entertaining the application, parties were heard and after hearing the parties on that preliminary issue, the parties were issued notice. On 28.08.1995 was fixed for first hearing, in the meantime, ad interim relief was granted. Thereafter, the matter was adjourned to 25.09.1995. The applicant submitted his written submissions copy of which was given to the other side and the matter was kept on 20.10.1995. Thereafter, it was fixed on 10.11.1995 and finally on 04.12.1995. On the last date, written submissions were submitted on behalf of the other side.

5. The main contention taken before the Deputy Collector was that the Mamlatdar has no power to issue the direction of removal of encroachment and to open the 'way'. It was submitted that under Sub-section 2 of Section 5 of the Mamlatdars' Courts Act, 1906, the Mamlatdar has no power to pass any such order. It was submitted that under the said provision, the Mamlatdar can pass an order only for not doing something, that means he can issue injunction only. In this regard, the applicant relied upon a judgment of this Court in the

matter of PATHAN MUKHTYARKHAN AJAMKHAN **(**Supra). It was also contended that the case/application filed before the Mamlatdar was beyond period of limitation because the case of the first applicant was that the way was closed for last two years. It was contended that period of limitation prescribed under Sub-section 3 of Section 5 of the Mamlatdars' Courts Act is '6 months' and, therefore, the order of the Mamlatdar be quashed and set aside.

It was also contended before the Deputy Collector that land bearing block No.372 was converted from agricultural to NA in the year 1982. It was plotted and plots were allocated to various persons, so there is no 'way' in existence, atleast since then. It was also contended that in the map, no such 'way' or 'Nelia' is shown; that the portion of land where a way is alleged, sub-plot Nos.45 and 46 are in existence and the persons in possession of those plots have their constructed houses in which they are residing since long. It was also contended that the owners – persons in possession of plot Nos.45 and 46 are the necessary parties and they are not joined. Therefore, the order of the Mamlatdar be quashed and set aside. It was also contended that the Mamlatdar has not taken into consideration the evidence of independent persons, that the leaders of the village are

not examined, in absence of which the order under challenge is incomplete and wrong and, hence, the same should be quashed and set aside.

6. The non-applicant before the Deputy Collector submitted that the present petitioner has not made any mention 'to and fro' way in block No.372 before plotting about the existence of it. He also submitted that the original land owner of block No.372 has made a declaration before the Mamlatdar in writing that there 'was' a way in block No.372 to go to block No.371.

It is also submitted that despite giving so many dates (opportunities), the petitioner did not remain present before the Mamlatdar. It is on record that an arrangement was made and alternative way was provided which too came to be closed, that gave rise to the present proceedings. It was also submitted that the order passed by the Mamlatdar was well within his jurisdiction; that in revenue map, on eastern side of block No.372, north-south 'Nelia' is shown which is in existence as on date; that this is the only 'way' to go to block Nos.375, 376, 377 and 378. It is also submitted that the owners of block No.372 have made an alternative arrangement for these block numbers, but have not given any 'way' to go

to block No.371. Therefore, Mamlatdar had to pass the order to open the 'way'.

7. The Deputy Collector after taking into consideration the submissions of both the parties and the fact that the Mamlatdar had got the matter investigated through Talati-cum-Mantri and the same was got verified by Circle Inspector, had passed the order within his powers under the Mamlatdars' Courts Act. The Deputy Collector also recorded that the argument of the petitioner that the Mamlatdar has no power to pass such order is misplaced. The Deputy Collector has also recorded that to go to any land, there has to be a way from time immemorial ('Parmparagat'); that in absence of a 'way' to go to block No.371, owner will not able to cultivate the same and that will affect the livelihood of the owner of block No.371. The Deputy Collector finally recorded that he does not find any reason to interfere with the order passed by the Mamlatdar.

8. Learned advocate Mr.Parekh conveniently read only Sub-section 2 of Section 5 of the Mamlatdars' Courts Act and part of paragraph No.3 of the judgment of this Court in the matter of PATHAN MUKHTYARKHAN AJAMKHAN (Supra), which he found to be favourable to his case.

Section 5 of the Mamlatdars' Courts Act is: -

**“Powers of Mamlatdars' Courts.”**

Clauses (a) and (b) of Sub-section 1 of Section 5 read as under:-

> “(a) **to remove or cause to be removed** any impediment, **erected otherwise than under due authority of law**, to the natural flow in a defined channel or otherwise of any surface water naturally rising in or falling on any land used for agriculture, grazing, trees or crops, on to any adjacent land, where such impediment causes or is likely to cause damage to the land used for such purpose or to any such grazing, trees or crops thereon.
>
> (b) to give of any lands or premises used for agriculture or grazing, or trees, or crops, or fisheries, or to restore the use of water from any well, tank, canal or water-course whether natural or artificial used for agricultural purposes to any person who has been dispossessed or deprived thereof **otherwise than by due course of law**, or who has become entitled to the possession or restoration thereof by reason of the determination of any tenancy or other right of any other person, not being a person who has been a former owner or part-owner or part-owner, within a period of twelve years before the institution of the suit of the property or use claimed, or who is the legal representative

of such former owner or part-owner.”

Proviso to the aforesaid Clause is equally significant, hence for the ready reference, it is reproduced:

> “Provided that if in any case the Mamlatdar considers it inequitable or unduly harsh *[to remove or cause to be removed any such impediment or], to give possession of any such property or to restore any such use to a person who has become entitled thereto merely by reason of the determination of any such tenancy or other right, or if it appears to him that such case can be more suitably dealt with by a Civil Court, he may in his discretion refuse to exercise the power aforesaid, but shall record in writing his reasons for such refusal.”

In the considered opinion of this Court, Mamlatdar is not helpless to deal with the situation as emerges in the present case. The Mamlatdar before passing an order to remove the obstruction and make open the 'way', did take all necessary procedural and technical steps. To reiterate – on an application being received dated 08.09.1993, the Mamlatdar got an investigation made by Talati-cum-Mantri, then he got it verified through a Circle Inspector. In addition to that, he took into consideration the revenue map and other material and then

came to the conclusion that the applicant was deprived of his agricultural land without due authority of law as the owners of block No.372 had closed his approach road and due to that, he was not able to cultivate his land. The petitioner herein took an unreasonable approach in the matter, he did not cooperate the Mamlatdar, it appears on the basis of illegal advice that the Mamlatdar has no power to pass any orders. Mamlatdar was left with no other alternative then to pass an 'order of removal', so as to restore the agricultural land to cultivation.

In the considered opinion of this Court, Mamlatdar was well within his bounds to order the opening of way which was closed without due authority of law by the owners of block No.372.

9. The Decision of this Court in the matter of PATHAN MUKHTYARKHAN AJAMKHAN (Supra) is relied upon by the learned advocate in support of his contention that the Mamlatdar has no power under Sub-section (2) of the Act to order removal. The learned advocate relied upon paragraph No.3 of the judgment, which reads as under:

> “3. The powers of the Mamlatdar functioning under the Mamlatdars' Courts Act, 1906, hereinafter referred to as “the Act”, are to be found in sec. 5. Under sub-sec. 5(1) of the Act, the Mamlatdar has

> the power under clause (a) to deal with impediments, erected otherwise than under due authority of law, to the natural flow in a defined channel or otherwise of any surface water. Under clause (b), he has the jurisdiction to give immediate possession of any lands or premises used for agriculture or grazing to any person who has been dispossessed or deprived thereof otherwise than by due course of law.....”

Under Clause (b) of Sub-section 5 of the Act, the Mamlatdar has power to give immediate possession of any lands used for agriculture. It can be appreciated that when a person is not allowed to approach his agricultural land, he is de facto deprived of that land. The Mamlatdar has power to restore the agricultural land under Clause (b) of Sub-section I of Section 5. That can be done only by getting the obstruction removed. Thus, he has the power to get such obstruction removed. This power is available to the Mamlatdar for removing the obstruction created by the owner of block No.372 when his obstruction resulted into deprivation of land bearing block No.371 as the defendant cannot cultivate it.

10. Learned advocate for the petitioner ought to have looked into a decision of the Division Bench of this Court in the matter of **KANBI DEVJI VALJI VS. KANBI SHAMJI**

**SHIVJI**, reported in 1977 Vol.XVIII, GLR 309. Opening paragraph of the said decision reads as under:

> "This revisional application, which arises from an order passed by the Mamlatdar of Bhuj, exercising powers under the Mamlatdars' Courts Act, 1906 (hereinafter referred to as "the Act"), and confirmed in revision by the Deputy Collector, Bhuj, has been referred to this Division Bench by the learned Single Judge, because the learned Judge found conflict between a decision of the Bombay High Court reported as *Bhau Mangesh Wagle v. Ahmedbhoy Habibbhoy*, 8 Bombay Law Reporter, 312 and the decision of a learned Single Judge of this High Court reported as *Mukhatyarkhan Ajamkhan v. Usmankhan*, 14 Gujarat Law Reporter, 607. The dispute referred centres round the question whether in exercising the powers under sec. 5(2) of the Act, the Mamlatdar can order removal of the obstruction complained by the plaintiff before him ? For this purpose relevant facts may be stated."

The Division Bench after taking into consideration various decisions of the erstwhile High Court of Bombay in the matter of **NANABHAI SADANAND VS. DWARKADAS DHARAMSI AND ANOTHER**, reported in 3, Bombay Law Reporter 631 and in the matter of **BHAU MANGESH WAGLE VS. AHMEDBHOY HABIDBHOY**, reported in 8 Bombay Law Reporter 312 and after having a threadbare analysis of all relevant

provisions of the Act, observed in paragraph Nos.7 and 8 as under:

> “7. We have no reason why we should not interpret the relevant provisions of the present Act in the same manner as was done by the Division Bench in *Bhau Mangesh's* case (Supra). Therefore, in a case where there is complete obstruction to a road or customary way, the obstruction would in law amount to deprivation of the use of the road or way and with regard to such deprivation of the use of road or way, the appropriate order including removal of the obstruction can be passed by the Mamlatdar as contemplated by sub-sec. (4) of sec. 19 of the Act. Sec. 21(1) of the Act provides for giving effect to the decision of the Mamlatdar restoring use by issuing such order to the village-officer or to any subordinate under his control or otherwise as the Mamlatdar thinks fit. This enabling provision in sub-sec. (1) of sec. 21 need not necessarily be confined to the cases contemplated by sec. 5(1) only. The terms in which sec. 19(4) and sec. 21(1) are enacted are quite wide and would cover, on the basis of the reasoning given in *Bhau Mangesh's* case (supra), the full deprivation of the use of a road, by creating an obstruction making the road impassable.
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> 8. Unfortunately, the decision in *Bhau Mangesh's* case (supra) was not brought to the notice of the learned Single Judge in which case the provisions in *pari materia* with the relevant provisions mentioned

above were interpreted in the context of deprivation of the use of road by raising of a cactus hedge and a shed. The Division Bench in terms stated that the remedy in that suit was not only the restoration of the use of the way, but also an injunction. On a correct interpretation of sec. 5(2) read with sec. 19(4) of the Act we hold that the Mamlatdar acting under sec. 5 of the Act has power to restore use of the road or customary way by ordering removal of an obstruction caused to the use thereof which may amount to total deprivation of the use of the road or customary way. Such an order cannot be said to be in excess of the power conferred on the Mamlatdar under sec. 5(2) of the Act. This view gets support from the interpretation of similar provisions of the earlier Act of 1876 by the Division Bench of Bombay High Court in the aforesaid cases. Therefore, the view taken by the learned Single Judge in *Mukhtyarkhan's* case (supra) is, speaking with respect, not correct."

11. It is on record that there was a 'Nelia' on the east of block No.372 running north-south and there was a 'Nelia' on south and of block No.371 running east-west. It is also on record that the owners of block No.372 have blocked the 'Nelia' on the south and of block No.372 which was running east-west by which the owners of block No.371 were passing through and were reaching to their land bearing block No.371. Therefore, the Mamlatdar was fully justified in passing the order to open the 'way'

leading to block No.371. The Mamlatdar is not expected to write a learned judgment so as to bring his action within the language employed by the legislature. The action of the Mamlatdar is to be appreciated in its true perspective and spirit and, therefore, this Court finds that the Mamlatdar has not acted outside the jurisdiction conferred upon him by the Mamlatdars' Courts Act.

Besides, clause (b) of Sub-section 1 of Section 5 also empowers the Mamlatdar to give immediate possession of any land or ..... used for agriculture..... to any person who has been dispossessed or deprived thereof, otherwise then by due course of law. In the present case, though the owner of block No.371 was not as such dispossessed of his land bearing block No.371, stood dispossessed of the same as he was not able to cultivate the same by the obstruction created in his way and therefore, when Mamlatdar directed for opening of 'way', it was virtually an order by which the Mamlatdar restored the possession, enabling the defendant to cultivate his land by ordering to open the 'way' leading to block No.371.

12. Acceptance of the contention of the learned advocate Mr.Parekh, will result in miscarriage of justice, which

is not expected of a Court under Articles 226 and 227 of the Constitution of India.

13. The language of Sub-section 2 of Section 5 of the Mamlatdars' Courts Act is:

> “The said Court shall **also**, subject to the same provisions, have within the said limits ..... requiring him to refrain [from erecting or attempting to erect any such impediment or] from causing or attempting to cause any further such disturbance or obstruction.”

It is more than clear that this power is in addition to the aforesaid powers and that is why the word, 'also' is used.

14. In view of the aforesaid discussion, the revision application fails and the same is dismissed. Rule is discharged with cost. Cost is quantified at Rs.7,500/- Interim relief, if any, stands vacated.

(RAVI R.TRIPATHI, J.)

*Shitole